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No. 91-71

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MING WAN LEUNG and LAU CHING CHIN,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Joint Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT REPLY BRIEF

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JOINT REPLY BRIEF

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1. The government's principal argument in its brief opposing certiorari is that the use of a ruse was permissible because "the sole purpose . . . was to see who answered the door." Brf. for United States 7. By answering the door, the government's argument goes, petitioner Lau "willingly exposed [her face] in which she surely had no privacy interest." *Id.* In essence, the government's position is that search and arrest warrant requirements do not apply to a visual inspection of the interior of a dwelling as opposed to a physical entry across the front door threshold. Thus, in the government's view, the circuit court correctly held that agents may use trickery or a ruse to visually inspect a dwelling to determine if a suspect is present.

The government's position that no "search" occurs absent a physical entry conflicts with *Katz v. United States*, 389 U.S. 347, 353 (1967), which observed that "the reach

of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure," and subsequent cases implementing this principle. *See, e.g., Arizona v. Hicks*, 480 U.S. 323 (1987) (even slight movement of an object which exposes to view concealed portions of an apartment or its contents constitutes a "search" for which a warrant is required); *California v. Ciraolo*, 476 U.S. 215 (1986) (warrantless aerial observation of residential backyard did not constitute a search only because the area was in plain view and the police employed no physically intrusive means to facilitate their visual surveillance); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant"; thus, Fourth Amendment was violated where the police used a radio transmitter to monitor conduct in a house even though the police did not physically enter the home to search); *United States v. Winsor*, 846 F.2d 1569 (9th Cir. 1988) (*en banc*) ("search" requiring a warrant occurred when the police looked into a hotel room through a door that was opened at their command while they stood in a corridor).

Consistent with these decisions, a "search" clearly occurred when agents visually inspected petitioner Lau's face and hotel room by means of a ruse. This case squarely presents the question, which has divided the circuits, whether such deceit may be used to circumvent arrest and search warrant requirements that ordinarily apply to such a police intrusion into a private dwelling.

The government's contention that petitioner Lau "willingly" exposed her face to the police officers' view is specious. Lau did not respond to the knocking on the door until the officers' deceptive entreaty, "housekeeping," was used. As the other circuits confronting such a scenario have held, a "consent" induced through such police trick-

ery is not voluntary and does not overcome the warrant requirement. *See* Joint Petition 7-8. While the seventh circuit has adopted the government's contrary view, it has thereby created a circuit conflict which only this Court can resolve.

The government's further contention that the ruse was employed "only to determine who would answer the door . . . and not to obtain entry into the room to make an arrest," Brf. 7, is disingenuous. The record is clear that the agents were looking only to locate Lau and any accomplices, and then to arrest them, and that is exactly what the agents did. This was not an undercover investigation as in *Lewis v. United States*, 385 U.S. 206 (1966).

Finally, the government argues that the exigent circumstances exception to the warrant requirement justified the entry into Lau's hotel room when she tried to shut the door that the agents had tricked her into opening. This argument is a red herring. Of course, once the agents ascertained that Lau was in the hotel room and she tried to escape from them by closing the door, the circumstances were exigent. But for the exigent circumstances exception to justify the use of the ruse itself to gain visual access to the apartment, which is the issue petitioners have raised, the focus must be on the circumstances that existed at the time the ruse was employed. If the use of the ruse was unlawful, then what followed was the tainted fruit of that illegality and cannot be used to justify a still greater intrusion. Since the government concedes that probable cause, which is a necessary element of the exigent circumstances exception, *see Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984), did not exist until *after* the agents' use of the ruse, Brf. 10, the exigent circumstances exception does not apply.

2. The government suggests that the Fourth Amendment issue should not be reviewed because it is raised in the context of an ineffective assistance of counsel claim. Brf. 6-7. But the court of appeals reviewed petitioners'

Fourth Amendment argument on the merits in order to determine whether to reach the broader, ineffectiveness issue. If this Court concludes that the court of appeals' Fourth Amendment holding was wrong, it need simply remand to permit the lower court to address whether the defense attorneys' failure to raise or pursue the issue constituted a constitutional violation and whether petitioners were prejudiced. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365 (1986). Needless to say, we disagree with the government's casual dismissal of petitioners' ineffectiveness claim. In view of the substantial case law in existence prior to petitioners' trial holding that a ruse entry violates the Fourth Amendment, and the absence of any strategic reason for failing to raise or pursue such a claim, petitioners' attorneys' conduct appears indefensible.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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